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No. 822

In The Supreme Court of the United States

OCTOBER TERM, 1943

THOMAS HENRY TROTT

vs.

McDONOUGH MOTOR EXPRESS CO., Inc.
a Corporation, et al

BRIEF FOR RESPONDENTS McDONOUGH MOTOR EXPRESS CO., A CORPORATION, ET AL. IN OPPOSITION.

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In The Supreme Court of the United States

OCTOBER TERM, 1943

THOMAS HENRY TROTT

vs.

McDONOUGH MOTOR EXPRESS CO., Inc.
a Corporation, et al

On petition for a writ of Certiorari to the Supreme Court of Mississippi

BRIEF FOR RESPONDENTS McDONOUGH MOTOR EXPRESS CO., INC., A CORPORATION, ET AL, IN OPPOSITION

JURISDICTION

The grounds upon which the jurisdiction of this Court has been invoked are Section 240 of the Judicial Code as amended by Acts of February 13, 1925, subsections A and B separately and severally, U. S. C. A. Title 28, Sec. 344, and also Rule 38 of the Revised Rules of the Supreme Court of the United States adopted February 13, 1931.

STATEMENT OF CASE [1]

Thomas Henry Trott filed his declaration in the Circuit Court of Lauderdale County, Mississippi, on May 9, 1941. By the Declaration he demanded of McDonough Motor Express and D. L. Pearson $50,000.00

1 All references to the record are to the original record in the Supreme Court of Mississippi, as the Petitioner has neither filed nor served a printed record.

damages claimed for personal injuries received, when he drove a truck belonging to Southern Motor Express into the rear end of a truck being driven by Pearson and owned by McDonough Motor Express. The claimed ground of liabliity was alleged negligence. (R. 4 to 20 inclusive.)

To the Declaration the respondents each entered their Plea of the General Issue and each gave Notice Under Plea of the General Issue of Affirmative Matter to be proved on the trial of the case. This Notice set up that Trott drove his truck in violation of laws of the State of Mississippi governing travel on the highways of the state; that he failed to keep a careful and vigilant watchout for other vehicles using the highway and preceding the truck he was driving, and failed to keep a careful and vigilant lookout for signals given by drivers of other vehicles on the highway; that he made no effort to stop his truck at a time when he was meeting other vehicles using the highway or to reduce his speed at said time; and that he drove forward with unabated speed with the lights of vehicles he was meeting in his face and when his visibility was lessened and his vision obscured; and that the negligence of Trott was the sole proximate cause of the collision. R. 24, 25.

A Supplemental Notice under each respondent's Plea of the General Issue was also filed. This Supplemental Notice was in the following language, formal parts omitted:

"And for supplemental notice to plaintiff under

defendants' Plea of the General Issue, Defendant says that on the trial of the case, it will offer evidence to prove and will prove that plaintiff was guilty of negligence which caused damage to defendant's truck, and plaintiff and his employer recognizing plaintiff's negligence paid this defendant for the damage which plaintiff's negligence caused to this defendant's truck when same was run into by the truck driven by plain tiff". (R. 26.)

To respondents' Supplemental Notice under the Plea of the General Issue Trott filed Counter Notice of affirmative matter which he would prove on the trial of the case. The Counter Notice was in the following words, formal parts omitted:

"Comes the plaintiff, Thomas Henry Trott, and for a counter notice to the supplemental notice given by the defendants under their plea of the general issue, says that on the trial of this case he will offer evidence to prove as follows, to-wit:

That the plaintiff was not guilty of the negligence which caused the damage to the defendant's truck, and that plaintiff did not recognize plaintiff's negligence and did not pay the defendant any sum of money for the damage to defendant's truck, and did not admit any liability to defendant for damage to its truck, and did not negotiate with or have any dealings with the defendant in connection with any settlement with respect to the damage to the defendant's truck.

That any negotiations which were had, or settle-

ment made, were had and made by the representatives of one or more insurance companies with which the plaintiff had no connection and by whose acts plaintiff was not bound; that any such settlement which was made by or on behalf of said insurance company or companies, was made purely as a compromise and to save the trouble and expense of prosecuting or defending a lawsuit with respect to said damages, and was in no sense a recognition or admission of liability on the part of the employer of the plaintiff; and that said negotiations were conducted and said settlement or settlements were made without the knowledge or consent or participation of the plaintiff, who at all of said times was lying desperately injured in the hospital and in no condition to know or appreciate what was being done; and that all of said facts were known by the defendant, or could have been known by the exercise of reasonable care." (R. 27, 28.)

Testimony was taken on the issues presented by the pleadings, many days being consumed thereby, after which a verdict was rendered by the jury in favor of McDonough Motor Express and D. L. Pearson and against Trott. Judgment was entered accordingly. (R. 734.) A motion to set aside the verdict of the jury and the judgment of the court and to grant plaintiff a new trial was filed by Trott. (R. 736.) This motion was heard and was overruled by the Court, appropriate order being entered. (R. 775.)

Trott appealed from the judgment of the Circuit Court to the Supreme Court of Mississippi. (R. 780.) A record of the proceedings in the Circuit Court, in-

cluding a transcript of the testimony taken on the trial of the case, was prepared and submitted to the Supreme Court of Mississippi. Appeal was thereafter heard by the Supreme Court of Mississippi and the judgment of the Circuit Court was affirmed. The Opinion of the Supreme Court of Mississippi is in the following words:

"We have carefully reviewed and considered this record and all questions involved, and have concluded that there is no reversible error herein; especially so in this case, since, in our opinion, the verdict of the jury on the merits is manifestly correct. Affirmed."

Reported 10 So. 2nd, 450.

A suggestion of Error was filed by Trott attacking the affirmance of the case and the opinion of the Supreme Court. This Suggestion of Error was overruled.

The case has now been brought to this Court upon Petition for Certiorari upon the idea that the State Supreme Court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

ARGUMENT

It is respectfully submitted that this is not a case where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

Due process in the 14th Amendment of the constitution is due process according to the Constitution and the laws of the particular state, and not the process of another state or of the United States.

State v. Felch, 105 Atl. 23, 92 Vt. 477

McLaughlin v. Bahre (Del) 166 Atl. 800, 5 W. W. Harr 466

Idaho County v. Finn Highway District, 253 P. 377, 43 Idaho 233

In re Mahon, D. C. Ky. 34 F. 525, 127 U. S. 700, 32 L. Ed. 283

In Mississippi, Circuit Courts are provided for by the State Constitution. Section 156 is as follows:

"The Circuit Court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law".

By Section 490 Mississippi Code 1930, Ann. the jurisdiction of the circuit court is prescribed by law. (See Appedix).

Trott selected the circuit court in Lauderdale County, in Mississippi in which to file his suit and in which to try it.

By Section 146 of the Mississippi Constitution the jurisdiction of the Supreme Court is set forth as follows:

"The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals".

By Section 3331 Mississippi Code 1930, Ann., the jurisdiction of the Supreme Court is set out by statute (see Appendix).

The Supreme Court of Mississippi has the right to affirm a judgment, right in its result, though the affirmance be on grounds not passed on by the lower court, and has the right to award restitution.

Hall v. Wells, 544 Miss. 289

Y. & M. V. v. Adams, 81 Miss. 90, 32 So. 937

Evans v. Lilly, 95 Miss. 58, 48 So. 612

Y. & M. V. Railway v. Hawkins, 105 Miss. 55, 61 So. 161-451

Any procedure according with the long established practice of courts of law or equity complies with due process.

Stephenson v. Kirtley (U.S.) 70 L. Ed. 213

Mere errors or irregularities in proceedings are not a denial of due process of law. *American Railway Express Company v. Kentucky*, 71 Law Ed. 639.

Practice long in existence is not lightly set aside as being in conflict with due process.

The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this Court to revise the decisions of the state courts upon questions of state law.

American Railway Express Company v. Kentucky, 71 L. Ed. 639,

Enterpise Irrigation District v. Farmers Mutual Canal Company, 61 L. Ed. 644.

Where the adverse party has the right to refute that which has been asserted, the Constitutional provision has been satisfied *M. J. & K. C. Railway v. Turnipseed,* 55 L. Ed. 78.

Where the law has been applied according to the settled course of judicial procedure in the particular jurisdiction, there is no question for the United States Supreme Court under the 14th Amendment.

Minder v. Georgia, 183 U.S. 559, 46 L. Ed. 328

French v. Barbour Asphalt Paving Company, 181 U.S. 324, 45 L. Ed. 879

Leeper v. Texas, 139 U.S. 462, 35 L. Ed. 225

Hurtado v. California, 110 U.S. 516, 28 L. Ed. 232

Slaughter-Houses Cases, 16 Wall (U.S.) 36, 21 L. Ed. 394

Nor is the fact that a party has been unsuccessful before the tribunal where his case was tried sufficient to invoke due process of law. *Stephenson v. Kirtley,* 70 L. Ed. 213.

Coming now specifically to the facts claimed by Trott to entitle him to a review by the Supreme Court, we respectfully submit counsel's argument being such as though the case was before a jury, answer thereto can hardly be presented other than by like argument. However, we will attempt to present the matters involved as briefly and succinctly as possible.

SUPPLEMENTAL NOTICE UNDER GENERAL ISSUE

As to Supplemental Notice under the General Issue, the first complaint ever suggested by Trott as to the Supplemental Notice was when his brief was filed in the Mississippi Supreme Court. No complaint as to the Supplemental Notice under the General Issue was made during the long trial had in the circuit court nor on motion to set the verdict and judgment of the Circuit Court aside and to grant Trott a new trial.

Trott apparently welcomed the filing by respondents of the Supplemental Notice. He joined issue with the facts set up in the Supplemental Notice by filing a Counter Notice to Supplemental Notice and set forth af-

firmative facts therein which he stated he would prove on the trial of the case.

The affirmative facts set forth in the Counter Notice are the facts which Trott now complains prejudiced him.

The Supplemental Notice was properly filed and was in accord with the practice in Mississippi provided by statute, Sec. 536 Miss. Code 1930, Ann. (Appendix).

Under the Notice as filed, respondent could not have introduced any evidence showing Trott was protected by insurance; *M. & A. Motor Freight Lines, Inc. v. Villare,* 1 So. 2nd 788, 190 Miss. 848, *Harrin v. Daly,* 31 So. 790, 80 Miss. 340, *Yazoo City v. Loggins,* 110 So. 833, 145 Miss. 793.

Trott introduced the issue by his Counter Notice. When he introduced the issue he could not thereafter rightly complain of evidence in regard thereto. *N.O.M. C. v. Cole,* 57 So. 556, 101 Miss. 173. It is the rule in Mississippi that a litigant cannot introduce an issue and thereafter complain thereof. He cannot sit quietly by and permit his adversary to introduce a point, introduce evidence to sustain that issue, make no objection thereto, and raise the question of competentcy and prejudice for the first time in the Supreme Court.

Houston v. King, 80 So. 799, 119 Miss. 347. *Williams v. Butts,* 87 So. 145, 124 Miss. 661. *Gale v. Lancaster,* 44 Miss. 413. *Anderson v. Leland,* 48 Miss. 253, *Estes v. M. C. Rwy.* 119 So. 199, 152 Miss. 814, *Mitchell v. Finlay,*

137 So. 330, 161 Miss. 527, *Parkinson v. Mills,* 159 So. 651, 172 Miss. 784.

Trott had a perfect remedy provided by law by which he could have eliminated the Supplemental Notice under the General Issue if this Supplemental Notice was improper and prejudicial to him. We submit it was only prejudicial in that it was against Trott's theory. It was in accord with general and accepted practices.

He had the right to move to strike the Notice, but he elected to join issue on the facts set forth and to introduce additional facts. The procedure is fully outlined in the following Mississippi decisions.

Rend v. Hoffman, 41 Miss. 616, *N. O. & R. Co. v. Wallace,* 50 Miss. 244, *Y. & R. Co. v. Humphrey,* 83 Miss. 721, 36 So. 154, *J. M. Jones Lumber Company v. Homachitto Development Company,* 141 So. 589, 163 Miss. 305.

The judge does not charge the jury orally from the bench in Mississippi. The procedure is for the litigants to present to the trial judge written instructions. The judge either grants or refuses the requested instructions. The granted instructions are then read to the jury by counsel for the respective litigants.

Trott had the right under the law to request an instruction to the effect that pleadings in the case should not be considered as evidence for the purpose of rendering a verdict. *G. & S. I. v. Saucier,* 104 So. 180, 139 Miss. 497, *G. & S. E. v. Simmons,* 121 So. 144, 153 Miss. 329.

No such instruction was requested and no motion was filed to strike the Supplemental Notice.

It will thus be seen the Supplemental Notice was properly filed and that the testimony complained of was introduced by Trott pursuant to Counter Notice filed by him.

It is stated by appellant that no evidence was introduced by respondents to sustain their Supplemental Notice. This statement is in error. See testimony Wilbur Rivers, R. 546-552, and cross examination of Trott and Gillespie. Rec. 640. The procedure was in accord with the established practice in Mississippi.

EXAMINATION OF WITNESS AND ARGUMENT AS TO TESTIMONY

Counsel's conduct in the examination of Mrs. T. H. Trott and of argument addressed to the trial judge in the presence of the jury during examination of Mrs. Trott is the next and only other matter complained of.

We respectfully submit counsel's statement and presentation of the facts as to this matter is not correct. We dislike to burden this argument by lengthy quotation from the record, but in fairness to the Court believe it necessary to quote from the record in order to properly set out the incorrectness of counsel's statement to the Court in his argument.

The statement in petitioner's brief to the effect that the court would do nothing for him to rectify the alleged

improper conduct of counsel is incorrect. The Court sustained petitioner's objection promptly when made. Out of the presence of the jury the trial judge made the following statement. R. 311. etc. "I am sure the attorneys on the other side want to be perfectly honest about it: That is why I let the jury go to the room to decide some way to correct that error between you lawyers by agreement if you can" - - - "You have a right, gentlemen, in answer to that to show what the actual facts are here to that jury" - - "All right, what do you want to do Mr. Cameron?" - - - "I don't think the Court has that right in this state. If I did it and you got a verdict, it would be reversed. I think that you attorneys have a right to explain it."

"Gentlemen, here is the way I see it. Mr. Snow says now that he has information that $500.00 has been paid—well, it shows that it has. Let that be explained to the jury by the doctor or whoever can explain it. If it is true $500.00 and only $500.00 can be paid" - - -

"I think you lawyers can easily agree, knowing all of you lawyers like I do" - - -

"I will allow you to counteract that by any statement."

Attorney Wilkinson and Attorney Cameron, representing Mr. Trott, requested that counsel representing respondents tell the jury they were in error. We were not in error and the record so shows. Trott had proved as an element of damage a large doctor's bill. He had introduced no itemized statement from his doctor or his

hospital. Respondents knew a portion of the hospital bill had been paid and the entire difficulty arose when an effort was made to find out on cross examination about this payment. It developed after the jury had been sent out that the payment had been made. Counsel stated to the Court and to Trott's attorneys he would state the facts to the jury. R. 313, R. 315. To counsel's offer, one of the attorneys representing Trott made the following statement. R. 315. By Mr. C. B. Cameron: *"I suggest that we proceed in an orderly manner and take what steps we conceive to be our right."* The Court responded to Mr. Cameron, "Yes".

Upon the foregoing statement being made, the jury was returned to the court room and the case was proceeded with. No motion for a mistrial was made.

Thereafter Attorney Wilkinson, one of Trott's counsel, took the stand as a witness and testified in full, R. 344 et seq.

The argument complained of, made to the trial court in response to objections and not made as an argument to the jury, but made to the court in the presence of the jury, was in the natural course of the trial and there was nothing prejudicial in the statements made.

For a true understanding of the remarks made and the questions propounded, further reference to the record must be made. Petitioner on direct examination had been asked by one of his counsel, Hon. B. F. Cameron as to

when he first employed an attorney to investigate and handle his claim. Rec. p. 194.

"Q. When was the first time, Tommy, that you ever got anybody to make any investigation of this accident for you?

A. Well, it was in Birmingham.

Q. When was that?

A. It was around April.

Q. Of what year?

A. Of this year.

Q. Up until that moment, had you ever mentioned to a lawyer, or anybody else, anything about looking into this accident for you?

A. No sir, I did not."

In answer to the testimony above set forth Trott was asked the following questions, to which he made answers, without objection, as follows:

(Record, 227)

"Q. And don't you know that this is a fact, that the reason you haven't consulted a lawyer until April of this year, you just didn't have any brakes and ran into the back of this car; and that the Company you were working for, you been drawing the

compensation that the law of Alabama allows you, and allows anybody under the same circumstances, and that that is the reason you haven't hired any lawyer up until this year?

A. The reason I haven't hired any lawer before I did was that I wasn't physically able.

Q. Just answer my question. How much compensation you been drawing?

A. $11.70 a week.

Q. $11.70 a week?

A. Yes, sir.

Q. Now the compensation officer came to the hospital?

A. He did.

Q. And you gave him a statement?

A. Yes, sir."

Respondents knew the brakes on the Southern Motor Express truck were bad. They knew petitioner knew they were bad, and that petitioner had stated the condition of the brakes on his truck was the cause of the accident.

Testimony of respondents' witness, Joe Lucy, Record, 430, from which we quote:

"Q. I want to ask you to tell the jury what he told you if anything as regards the cause of this unfortunate accident?

A. Well, he told us that if he had had trailer brakes on that truck that he could have stopped, he wouldn't have hit in the back of McDonough's truck."

Also, testimony of respondents' witness, Woodard Gaddy, Record, 481, from which we quote:

"Q. Did you all talk with Mr. Trott?

A. Yes, sir.

Q. Did you talk to him about what caused this accident?

A. Well, not exactly; no, sir.

Q. Did he undertake to tell you how it happened or what caused it?

A. Well, the only thing he told me that if he had had brakes he believed he could have kept from hitting the truck.

Q. Mr. Gaddy, how long were you and Joe up there to see him?

A. Oh, about fifteen or twenty minutes."

Mrs. Trott, after testifying to the nature of her hus-

band's injuries, was asked, by Honorable B. F. Cameron, when petitioner employed an attorney. (Record, 303)

She also testified as to the length of time petitioner spent in the hospital, and as to the amount of his medical expense. On direct examination she testified that the medical expense at Meridian was $4255.00, but no itemized statement of the medical expense was then introduced.

When petitioner had finished his primary direct examination of Mrs. Trott she was presented to respondent for cross-examination.

The question of compensation received by Trott through Southern Motor Express by reason of his injuries had already been gone into without objection. Mrs. Trott, without objection by petitioner, verified the fact that petitioner received compensation. She had just testified on direct examination as to special or consequential damages, petitioners' medical expense. Respondent conceived that we had the right to find out something about whether the medical expense was petitioners' loss or not. We have always understood that in states where a workmens compensation law is in force the employer either has to pay the compensation out of pocket, or purchase and pay for insurance to be paid to him, and by him to his injured employee. If Mr. Trott did not have to pay the medical expense incident to his injuries he cer-

tainly could not collect, as an item of expense, that which was not an expense to him. We, therefore, undertook to determine what part of the medical expense Mr. Trott would have to pay himself, and what part he would not have to pay. When we undertook to question Mrs. Trott counsel objected on the stated ground that we could not prove the laws of Alabama by the witness. We then conceived that counsel only objected to the form of question, and that he would not object to our proving what had been paid on the medical bill by Southern Motor Express, or by its insurer. We ask the court to keep in mind petitioner in his answer to our supplemental plea under the general issue had voluntarily stated that Southern Motor Express carried insurance on its truck to protect it against loss by reason of injuries or damage to third persons. We realized appellant had already injected the insurance feature into the case, and that it was not objectionable to petitioner for the insurance angle to be gone into.

Our next question was:

> "Q. Is he not entitled as a part of his compensation to have additional sums with which to pay hospital bills and doctors' bills?"

Objection was made to that question and the reason assigned was that counsel objected to questions about

compensation, stating there was no pleading which would justify the question as to compensation being asked. Compensation had been testified to by petitioner without objection, and had been testified to on direct examination by Mrs. Trott without objection.

When objection was stated by petitioner, counsel representing respondents undertook to state to the court why he thought the question objected to was competent. When our statement was made to the court Judge Wilkinson, one of counsel for petitioner, produced an Alabama Code and made the following remarks to the court:

Record, 305:

"BY MR. WILKINSON:

The law of Alabama pays a hundred dollars. As to what they can get, that is all. Here is the code for it."

Of course, Judge Wilkinson was wrong as to what the law provides, and it developed later that he knew Southern Motor Express had provided itself with an insurance policy which would pay $500.00 to be applied on petitioner's medical expense, and the Company was not certain that its policy did not take care of the entire bill.

The court then stated we could not prove by the witness what the laws of Alabama are. We knew that was not the question which had been asked, and so advised the court; to which the court responded that it "had already ruled". We then changed the question so as to get the court's idea and the following question was put. (Record, 306)

"Q. This compensation that you have comes through the Southern Motor Express, your husband's employer, does it not, Mrs. Trott?

A. Now I don't know anything about this compensation check. All I know, it comes from Atlanta."

There was no objection made to this question and answer. Whereupon, the following question was put:
(Record, 306, continuing)

"Q. Now as a part of that, and in addition to the weekly stipulation or amount which he gets, there is a medical fund, is there not, ma'm?"

Objection was made to this latter question and counsel making the objection gave the following reason therefor.

(Record, 306, continuing)

"BY MR. C. B. CAMERON:

We object to that if the Court please, for the reason that any compensation that this young man receives under the law of Alabama is not in bar of any right to his recovery of physical pain and expense from his injury under the law."

In response to petitioner's objection respondents' counsel undertook to state to the court his reason and argument as to why the question objected to was com-

petent. Same will be found at pages 306 and 307 of the record, and is in the following language:

"BY MR. SNOW:

You will recall on yesterday that Mr. Trott was asked in regard to the Southern Motor Express sponsoring this lawsuit to get out of the payments themselves. Now then, this is simply following that up. We have a right to show, when they ask these defendants to compensate them, we have a right to show that he is paid a fund that he doesn't have to sue for, that is provided through his employer, as compensation to an injured employee, with which to pay this money.

BY MR. C. B. CAMERON:

In response to that, we say if the Court please, that the allowance of workmen's compensation in Alabama to this young man for his injuries is not in bar of any right that he has to collect from this defendant for its negligence for his injuries, and doctors' and hospital bills.

BY MR. SNOW:

Before your Honor rules, may I make this observation. There is no law in the world whereby a man may collect twice for the same injury."

During the time when counsel was stating his reason and argument Honorable C. B. Cameron broke in and made a statement, and when appellees' counsel had concluded Judge Wilkinson arose and started to address the court. (See Record 306). It then occurred to counsel rep-

resenting respondents that further argument should not be made in the presence of the jury. We recalled that when Judge Wilkinson had been on his feet, addressing the court only a few minutes before, he had made a statement of fact to the court and in the presence of the jury. We had simply stated what we intended to show by the witness, while Judge Wilkinson had produced an Alabama Code and stated what the Code showed.

We submit counsel's argument and version as to what happened is without merit. If the medical bills were not a charge against Mr. Trott we had a right to show it, and if any part of the medical bill had been paid by petitioner's employer we had a right to show that. We submit we were in good faith in so doing. If Southern Motor Express or Maryland Casualty Company were sponsoring the suit, when the accident was brought about by defective brakes on Southern Motor Express' truck, and an adjuster of Maryland Casualty Company, or anyone else, had been to the hospital and prevailed upon Mr. Trott to sue in order for his company to wrongfully shift the burden to someone else, then the facts in regard thereto were competent; especially so after Mr. Trott had testified, as to his compensation and as to his having given a statement to an investigator, without objection.

See 22 C. J. 195, paragraph 163; C. J. S. 31 page 19, paragraph 190.

Lee County Gin Co. v. Middlebrook, 137 So. 108; 161 Miss. 442.

Standard Oil Co. v. Franks, 149 So. 798; 167 Miss. 282;

Magruder v. Palmer, 69 So. 498; 100 Miss. 516.
Leach v. Shelby 58 Miss. 691.

Medical expense, in personal injury suits, are only special or consequential damages. This class of damages must be sued for and proven.

In the case of *Weyen, et al v. Weyen,* 139 So. 608; 165 Miss. 257, the court said:

> "Where hospital and medical expense had been paid by defendant who had not been reimbursed by plaintiff latter could not recover them in action for negligence."

Chapman v. Powers 116 So. 609-150 Miss. 687

Galtney v. Wood, 115 So. 117; 149 Miss. 56.

N. O. & N. E. v. Hegwood, 124 So. 66; 155 Miss. 104

M. C. v. Smith, 168 So. 604; 175 Miss. 306.

The questions asked and the colloquy before the court was all directed to the question of medical expense. No other element of damage was involved. The jury decided the case against petitioner on the issue of negligence.

Looking at the matter from the most favorable stand-

point to petitioner, the most that can be said is that this testimony was directed to damages. The jury found that respondents were not guilty of negligence. The jury found against petitioner on the question of liability vel non. Since the jury has found against appellant on the question of liability any error as regards damages would not be held to have prejudiced appellant.

In the case of *Fairchild v. L. & N. Ry. Co.* 48 So. 513 98 Miss. 887, the court said:

> "We desire to say that in our judgment instructions numbers and 11 ought not to have been given, but, since they relate alone to the measure of damages we would not reverse on this account, since the jury has found no liability at all existed."

In the case of *Henderson & Mathis v. Hines,* 83 So. 589; 121 Miss. 339, the court held:

> "Instructions on the question of damages become immaterial on a verdict being rendered for defendant on the main issue."

Also, see *Hicks v. Miss. Lumber Co.* 48 So. 624; 95 Miss. 353

Bradford v. Taylor, 37 So. 812; 85 Miss. 409.

Cumberland Tel. & Teleg. Co. v. Jackson, 48 So. 614; 95 Miss. 79

L. & N. Ry. Co. v. McCaskill, 53 So. 348; 98 Miss. 20

M. & O. R. R. v. Campbell, 75 So. 554; 114 Miss. 803

Stamps v. Polk, 108 So. 729; 143 Miss. 551;

Moore v. Jackson, 114 So. 734; 148 Miss. 827

White v. Weitz, 152 So. 484; 169 Miss. 102

Pritchard v. Myers, 11 S. & M. (19 Miss.) 169

Corvin v. Cannon, 31 Miss. 570.

But, this case cannot be reversed on the theory of misconduct on the part of counsel representing respondents, for other reasons.

Counsel representing appellees stated to the court that he was willing to tell the jury what the situation was. It came out during the argument before the court, in the absence of the jury, that a payment of $500.00 was shown on an itemized statement of medical expense which Mrs. Trott had, and which had not been introduced in evidence at the time of the colloquy complained of. It further came out that an adjuster of Maryland Casualty Company had told appellant's attorneys that $500.00 had been paid on the medical expense, and that the company was considering whether or not its policy covered the entire expense. The court asked counsel representing petitioner what they wanted to do about the matter. The trial judge manifested his willingness to do whatever petitioner's counsel requested in regard to the matter, and finally stated, when no solution was offered by appellant's counsel, and when no request was made by them,

that (Record, 314) "I will allow you to counteract that by any statement".

The court discovered that $500.00 had been paid on the medical expense, and recognized that counsel representing respondents were sincere. He, no doubt, recognized that the entire situation had been brought about by failure of counsel representing petitioner to introduce the itemized statement which Mrs. Trott had in her possession.

Finally, counsel representing petitioner shut off further discussion of the question, out of the presence of the jury, by use of the following language, record 315:
"BY MR. C. B. CAMERON:

I suggest that we proceed in an orderly manner *and take what steps we conceive to be our right.*"

"BY THE COURT:

Yes."

Thereafter, taking such steps as they conceived to be their right, petitioner's counsel placed one of their number, Judge Wilkinson, on the witness stand and he proceeded to tell the jury all about his employment by Mr. Trott; to refute any connection by Southern Motor Express with the law suit; to testify as to the supplemental notice under the general issue and the answer thereto; to testify as to the Alabama Compensation Law; and as to the medical bills and payments made thereon. His

testimony is shown in the record at pages 344 to 353 inclusive.

Judge Wilkinson also testified, record, 344, as follows:

"Q. Have you held any office in the State of Alabama?

A. Well, a few.

Q. State to the Court and jury what you have held over there?

A. I was Assistant Attorney General of the State for a while. I was Special Assistant Attorney General for the State for a while. I was Circuit Judge of the Tenth Judicial Circuit."

Petitioner further put Fred Vann, Business Manager of Rush's Infirmary, on the witness stand and he testified as to the medical bills and payments made thereon. (Record 335 etc.)

Petitioner selected the course he would take. The trial judge sustained petitioner's objection to the question asked. He offered to do what petitioner requested in order to right the supposed error. That was all he could do.

Where a party to a suit refuses an offer by the Court to correct an error made he cannot complain of the verdict, In *Carlisle, et al v. City of Laurel, et al,* 124 So. 786; 156 Miss. 410 it is said:

"Where during progress of trial, court makes error and offers to correct it and tenders injured party all rights which he would have but for error, and he refuses same, he cannot, in appellant court, complain of error thus offered to be fully corrected at time when no harm had been done and no prejudice injected."

In the case of *Robertshaw Trustees v. C. & G. Ry,* 188 So. 308; 185 Miss. 717 the court held:

> "Where trial court promptly ruled against improper evidence as soon as it appeared as such and took every subsequent step which it was requested to take to root out the objectionable matter, and only thing also that the court could have done to eradicate it wholly was to grant a mistrial, which the court was not asked to do, there was nothing saved for review by Supreme Court."

After discussion and after due deliberation counsel representing petitioner announced that "we proceed in an orderly manner and take what steps we conceive to be our right". (Record, 315)

No motion for a mistrial was made by petitioner. It cannot be said request for a mistrial was simply overlooked, for only a short time before counsel representing respondents moved the court for a mistrial by reason of misconduct of counsel representing petitioner, and argument was had thereon. (Record, 203, 204, 205) Petitioner chose his course.

The rule is well established in Mississippi that where

conduct of counsel is attacked the Supreme Court will not reverse, even where the conduct is unwarranted and flagrant, unless the complaining party has requested a mistrial, and the trial court has overruled his motion for a mistrial. A litigant cannot gamble on the verdict being favorable to him and then when he is disappointed in the verdict ask for a reversal thereof.

Holmes v. State 118 So. 431, 151 Miss. 702

Brush v. Laurendine 157 So. 818, 168 Miss. 7

Vicksburg Ice Co. v. Delta Ice Co. 119 So. 824

Mars v. Hendon 171 So. 88, 178 Miss. 157

Robertshaw Trustees, et al v. Columbus and G. R. R. 188 So. 308, 185 Miss. 717

Teche Lines v. Keller 165 So. 305, 174 Miss. 527

Nelms v. Blum, & Fink 131 So. 817, 159 Miss. 372

Petitioner had his day in court. His case was passed on by Circuit Court of Lauderdale County, Mississippi, and by the Supreme Court of Mississippi. The rules of law applicable in the jurisdiction where appellant filed his suit were applied. We submit there were no errors made by the Circuit Court or by the Supreme Court in the trial of this case, but if errors were made this Court will not attempt to try and rectify those errors. See *Stephenson v. Kirtley,* 70 L. Ed. 214.

Petitioner has been accorded due process of law according to the jurisdiction in which his case was tried. There is no federal question here involved such as requires decision of this Court.

CONCLUSION

The decision of the Supreme Court of Mississippi is manifestly correct and presents neither a conflict of decisions nor any federal question of general importance. The petition should therefore be denied.

Respectfully submitted,

GEORGE BUTLER

EDW. L. SNOW

J. A. COVINGTON, Jr.

APPENDIX

490. Jurisdiction—general enumeration of subjects.—The circuit court shall have original jurisdiction in all actions when the principal of the amount in controversy exceeds two hundred dollars, and of all other actions and causes, matters and things arising under the constitution and laws of this state which are not exclusively cognizable in some other court, and such appellee jurisdiction as prescribed by law; and such court shall have power to hear and determine all prosecutions in the name of the state for treason, felonies, crimes, and misdemeanors, except such as may be exclusively cognizable before some other court; and said court shall have all the powers belonging to a court of oyer and terminer and general jail delivery, and may do and perform all other acts properly pertaining to a circuit court of law.

3361. Jurisdiction of the court.—The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals, and shall hear and determine all manner of pleas, plaints, motions, causes, and controversies, civil and criminal, which are now pending therein, or which may be brought before it, and which shall be cognizable in said court; but a couse shall not be removed into said court until after final judgment in the court below, except in cases particularly provided for by law; and the Supreme Court may grant new trials and correct errors of the circuit court in granting or refusing the same.

536. Notice of special matter under general is-

sue.—If the defendant desire to prove under the general issue in an action any affirmative matter in avoidance, which by law may be proved under such plea, he shall give notice thereof in writing, annexed to or filed with the plea, otherwise such matter shall not be allowed to be proved at the trial; and the defendant may, in all cases, plead the general issue and give written notice therewith of any special matter which he intends to give in evidence in bar of the action, and which he would be otherwise obliged to plead specially; and, when such notice shall be given by the defendant, the plaintiff shall, before the trial of the cause, file a written notice to the defendant of any special matter which he intends to give in evidence in denial or avoidance of such special matter so given notice of by defendant, and to which it would have been necessary to reply specially had the defendant's defense been specially pleaded; and if notice be not given as required, evidence of such matters shall not be admissible on the trial.

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CLERK

No. 822

In The Supreme Court of the United States

OCTOBER TERM, 1943

THOMAS HENRY TROTT

vs.

McDONOUGH MOTOR EXPRESS CO., Inc.
a Corporation, et al

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS UNITED IN THE ALTERNATIVE WITH A MOTION TO AFFIRM

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The Respondent moves the Court to dismiss the Petition and in the alternative moves for an affirmance, after the Court has ruled upon the jurisdictional matters, upon the following grounds:

1. The Petitioner has presented no separate typewritten statement showing that the nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon.

2. The Petitioner has filed no printed brief with references to a printed record.

3. The Petitioner has served no copy of a printed record upon the Respondent.

4. The page references in Petitioner's brief to

pleadings, evidence and other proceedings are not to a printed brief, and it is not disclosed to what the page references refer.

5. While under the provisions of law relating to proceedings in forma pauperis in courts of the United States (U. S. C. A. Title 28 Sec. 831; July 20, 1892, C 209, Sec. 1, 27 Stat. 252; June 25, 1910, C 435, 36 Stat. 866; June 27, 1922, C 246, 42 Stat. 666) a litigant is not required to prepay fees or costs or for the printing of the record, he is not relieved of printing the record and of compliance with the appellate procedure and the rules of the Court.

6. The Petitioner is in default of Rules 12, 13, 27 and 38 of this Court.

Respectfully submitted,

George Butler
Edw. L. Snow
J. A. Covington, Jr.